83-1156

No. _____

In The
Supreme Court of the United States
October Term 1983

JOHN R. WILSON, et al.,

Cross-Petitioner,

vs.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether Title 25, U.S. Code §194, which places the burden of proof on the "white person" in a suit by "an Indian" over title to property, is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian Tribes, and against other persons in violation of the due process clause of the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below are: The United States of America and the Omaha Indian Tribe, who were the plaintiffs, and John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson, who were defendants and who are the cross-petitioners herein. Other defendants in the proceedings below are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, Travelers Insurance Company, The State of Iowa, and the State Conservation Commission of the State of Iowa.

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John R. Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc. and Otis Peterson, who are respondents as to the Petition of the United States in No. 83-952, cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals is reproduced as Appendix A, B, C and D to the Petition of the United States in No. 83-952. The opinion is reported as *United States v. Wilson,* 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983). The most recent memorandum and order of the district court is reported as *United States v. Wilson,* 523 F.Supp. 874 (N.D. Iowa 1981). Other opinions in this case, in chronological order, are: *United States v. Wilson,* 433 F.Supp. 57 and 433 F.Supp. 67 (N.D. Iowa 1977), vacated and remanded *sub nom. Omaha Indian Tribe v. Wilson,* 575 F.2d 620 (8th Cir. 1978), vacated and remanded, *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979); remanded to district court, *Omaha Indian Tribe v. Wilson,* 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980).

JURISDICTION

On December 8, 1983 the United States filed a timely Petition For a Writ of Certiorari in No. 83-952 asking for review of the judgment of the court of appeals entered on June 10, 1983. The United States invoked the jurisdiction of this Court under 28 USC §1254(1). The cross-petitioners received the Petition on December 12, 1983. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of The Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25 §194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. §2126.

Derivation. Act of June 30, 1834, C.161, §22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

> No person shall . . . be deprived of life, liberty or property, without due process of law;

———o———

STATEMENT OF THE CASE

This case is a consolidation of suits brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation, which was established on the Nebraska side of the Missouri River pursuant to a treaty of 1854.

The complaint of the Tribe invoked the jurisdiction of the district court under 28 USC §§1331 and 1362. The complaint of the United States invoked the jurisdiction of the district court under 28 USC §1345.

The critical factual issue in the case was whether the Missouri River moved over an area, referred to as the

Barrett Survey, in an avulsive or accretive manner at various times since 1854. If the movements were avulsive in nature the original reservation boundaries would remain unchanged and the United States and the Tribe would prevail. If the movements were accretive, the land in question would be Iowa riparian land; it would not be a part of the reservation; and the defendants would prevail. The district court, applying normal burden of proof requirements, placed the burden of proof on the United States and the Tribe; found the movements to be accretive; and held for the defendants, cross-petitioners herein.[1] The Eighth Circuit Court of Appeals held that 25 USC §194 applied to place the burden of proof on the defendants and reversed.[2]

This case was previously before this Court pursuant to its grant, on November 13, 1978, of the Petition for Certiorari of cross-petitioners Wilson, et al., (No. 78-160) limited to two questions presented by that petition which were:

> Whether the Eighth Circuit erroneously construed Title 25 USC §194 to make it applicable in this case.
>
> Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.

The Court did not grant certiorari on the question of the constitutionality of 25 USC §194 presented in the petition of defendants RGP, Inc. and Otis Peterson in No. 78-162.

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1. *United States* v. *Wilson*, 433 F.Supp. 57 and 433 F.Supp. 67 (N.D. Iowa 1977).

2. *Omaha Indian Tribe* v. *Wilson*, 575 F.2d 620 (8th Cir. 1978).

In its opinion in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court construed 25 USC §194 to be applicable to place the burden of proof upon the defendants in this case, except for the State of Iowa to which the Court held section 194 would not apply; found federal law of accretion and avulsion was controlling, but that the law of Nebraska should be borrowed as the federal rule of decision in this case; and remanded this case to the court of appeals to consider whether the district court had correctly interpreted Nebraska law and had properly applied it to the facts in this case.

The court of appeals on remand again vacated the judgment of the district court, which had quieted title in defendants, and remanded the case to that court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe.[3]

On remand the district court, on September 8, 1981, entered a Memorandum Opinion and Order quieting title in the United States and the Tribe and ruling adversely to cross-petitioners on issues raised by them concerning the title status of certain lands within the Barrett Survey which had been patented in fee and the entitlement of cross-petitioners to reimbursement for improvements made to the land.[4]

On appeal to the Eighth Circuit the cross-petitioners, in addition to appealing from the adverse rulings on the

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3. *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980) cert. denied 449 U.S. 825 (1980).

4. *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981).

fee patent land and improvement issues, raised the issue of the constitutionality of 25 USC §194, the application of which was a determinative factor in the adverse ruling on the issue of ownership of the entire land in controversy. The court of appeals reversed on the issues of fee patent land and improvements and remanded the case once again to the district court for further proceedings but made no ruling on the issue of the constitutionality of 25 USC §194.[5]

The United States in No. 83-952 has petitioned for a writ of certiorari with respect to the ruling of the court of appeals on the improvements issue. The cross-petitioners in this cross-petition seek a writ of certiorari to the Eighth Circuit on the question of the constitutionality of 25 USC §194.

REASONS FOR GRANTING THE CROSS-PETITION

The decisive impact of 25 USC §194 on this litigation has been noted by both the district court and the court of appeals.[6] Although section 194, which allocates the bur-

5. *United States v. Wilson*, 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983).

6. The court of appeals stated: "We recognize that to require the defendants to prove the cause of the river's movements occurring some 100 years after the event is indeed an onerous burden. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 651. The district court observed:

> There can be no doubt, however, that 25 USC §194 has been a determinative factor in the outcome of this

(Continued on following page)

den of proof based upon race, would seem almost to compel a thorough constitutional review, the constitutionality of that statute has received only slight attention in this case. In a footnote to the first opinion of the court of appeals, the constitutional question was dismissed with a brief reference to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).[7] The court of appeals, though asked to consider this issue in the most recent appeal, failed even to mention it.

The potentially enormous impact of section 194 in future cases involving Indian land claims should be appar-

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case. In the Appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago.

United States v. Wilson, 523 F.Supp. 874, fn. 19.

7. In footnote 18 to its opinion in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 (1980) the court of appeals said:

> The defendants question the constitutionality of 25 USC §194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974), that:
>
> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.
>
> (citations omitted).

The defendants, it should be noted, did not raise the constitutional issue on the first appeal since they were appellees, having obtained a judgment from the district court dismissing the plaintiffs' quiet title actions.

ent. The reversal of the burden of proof in such cases will be triggered under the statute whenever the Indian or Indian tribe, or the United States as its "champion", demonstrates that it was "once in possession of or had title to the area in dispute".[8] As the circumstances of this case demonstrate, the remoteness in time of the last Indian possession is immaterial. Any tribal possession in the instant case ceased at least by 1912. With respect to much of the land within the Barrett Survey, it ceased even before that as the Missouri River moved back and forth across that area in the latter part of the 19th century.

The reversal of the normal burden of proof requirements coupled with the inability of defendants in cases such as this to rely upon statute of limitations or laches defenses[9], creates almost insurmountable obstacles to the defense of Indian land claims brought by the tribes or the United States. When the full resources of the United States government are brought to bear on behalf of the Indian claimants, as they have been in this case, the burden is overwhelming.

The instant case demonstrates exactly the consequences of a combination of these forces. The ultimate conclusion of the court of appeals, it may safely be said,

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8. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668.

9. The federal courts have consistently held that limitations defenses cannot be asserted against Indian land claims brought by tribes or the United States. See, e. g., *United States v. 7,504.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. 527 (N.D. N.Y. 1977); *Schaghticoke v. Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co.*, 418 F.Supp. 798 (D. Rhode Island 1976).

is that neither side in this litigation has been able to convincingly demonstrate the nature of the river movements occurring almost a century ago which are critical to this case. The evidence on both sides has necessarily involved the "educated guesses" of expert witnesses which the court of appeals has found to be speculative and not sufficient to sustain a burden of proof.[10] Nevertheless, because section 194 automatically places the burden of proof on the defendants, the result is that the United States and the Tribe are now in a position to reclaim land on the Iowa side of the Missouri River which the Tribe had neither occupied nor claimed for almost a half century before instituting this litigation.

The constitutional validity of 25 USC §194, it is submitted, is a question of great significance to all pending and future litigation involving Indian land claims. The instant case shows so clearly the impact that section 194 can have on that type of litigation. It presents a very appropriate context in which to examine the constitutionality of the racial preference granted by section 194.

This Court's decisions in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980) set forth the standards by which the constitutionality of racially preferential statutes must be reviewed. In *Bakke* the Court reaffirmed the traditional strict scrutiny standard in striking down the racial

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10. The court of appeals in its second opinion, *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153, 1160, commented: "Evidence of river movements in the critical periods too often gives no more than a basis for an 'educated guess', in the words of defendant's expert witness, Dr. George Hallberg."

quota system at issue there.[11] In *Fullilove*, the Court upheld the validity of congressional legislation granting a preference to minority contractors to remedy the effects of past discrimination. The Court's opinion in *Fullilove*, however, stated that remedial legislation of the type there involved carried with it the "need for careful judicial evaluation to assure that any congressional program that employed the objective of remedying the present effect of past discrimination is narrowly tailored to the achievement of that goal". Id. at 480.

25 USC §194, it is submitted, fails to satisfy the standards of *Bakke* and *Fullilove*. There is no articulated basis in the legislative history of that statute which reveals a "substantial interest" or demonstrates that the racial classification of that statute is necessary to the accomplishment of any such interest. There is nothing to show that the statute is "narrowly tailored" to remedy "the present effect of past discrimination." In fact there is no legislative history at all upon which to rely in ascertaining the Congressional intent or purpose underlying that statute. "The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute". *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667. In the absence of legislative history or any other

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11. In *Bakke*, the court stated:

> We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." [citations omitted]
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> 438 U.S. at 305.

means by which to identify a "substantial interest" or the "necessity" of the racial classification the statute must fail. The court in its opinion in *Bakke* stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

438 U.S. at 307.

Moreover, the mere fact that the instant case is the first reported case to apply 25 USC §194 in the almost one hundred and fifty years since the statute was enacted belies any notion that a "substantial interest" is served by section 194 or that it is "necessary".

The court of appeals in its only comment upon the constitutionality of section 194 referred to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).[12] *Morton* upheld a statute granting Indians an employment preference with the Bureau of Indian Affairs. The court of appeals interpreted *Morton* as supporting the proposition that Indians may be singled out by Congress "for particular and special treatment". *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 n. 18.

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12. *Omaha Indian Tribe v. Wilson*, 575 F.2d 670, 631 fn. 18 (8th Cir. 1980).

Morton cannot be read so broadly. The Court in *Morton* was careful to emphasize that the employment preference at issue was a "political" preference and not a racial preference in that the special treatment was accorded to Indians not as a racial group, but as members of quasi-sovereign tribal entities.[13] Subsequent cases upholding special Indian legislation in the face of equal protection challenges also do so on the grounds that the special treatment is not based upon race but upon the unique legal status of Indian tribes. The distinction is stated in *United States v. Antelope*, 430 U.S. 641, 646 (1977).

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more

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13. *Morton v. Mancari*, 417 U.S. 535, 553, 554 (1974). The limits of the type of classification approved in *Morton* was stressed again in the court's opinion in *Bakke*.

> Petitioner also cites our decision in Morton v. Mancari, 417 US 535, 41 L Ed 2d 290, 94 S Ct. 2474 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is sui generis. Id., at 554, 41 L Ed 2d 290, 94 S Ct 2474. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." Ibid.
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> 438 U.S. 265, 304 fn. 42

broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." *Morton v. Mancari,* supra, at 553 n. 24, 94 S.Ct., at 2484.

In contrast with the legislation examined and upheld in *Morton,* and *Antelope,* and also in *Fisher v. District Court,* 424 U.S. 382 (1976)[14] and *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977)[15], 25 USC §194 draws a bright racial line. It is cast in terms of "an Indian"—literally an individual Indian—and a "white person". The preference is granted to the Indian regardless of his tribal status. The "property" referred to in the statute is not limited to tribal or reservation property. The preference granted to the Indian operates directly to disadvantage the "white person" or non-Indian where the interests of the Indian are in direct conflict with those of the "white person" or non-Indian. In no sense is the classification of section 194 "political" in nature so as to justify application of the more liberal standard of review enunciated in *Morton, Weeks, Fisher,* and *Antelope.*

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14. *Fisher* involved the exclusive jurisdiction of tribal courts under the Indian Reorganization Act, 25 USC §476, which precluded access to state courts in adoption matters involving tribal Indians.

15. *Weeks* involved Congressional legislation, 25 USC §§1291-1297, authorizing distribution of funds to certain Delaware Indians but excluding others.

Finally, 25 USC §194 does not even meet the standard of *Morton*, were that standard to apply. The preference granted in section 194 cannot be said to be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." The Court, even where it has applied this more liberal standard, has cautioned that it will "scrutinize Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment", *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). No such judicial scrutiny of 25 USC §194 has taken place in this case.

Implicit in the Court's decision in *Wilson v. Omaha Indian Tribe*, supra, is that the original purpose of the statute when it was enacted in 1834 was to provide remedies against non-Indian squatters on Indian land by offsetting any unfair advantage the non-Indian might have.[16] However, if the statute may once have had a "rational tie", that "tie" has been lost as Indians have attained much greater access to the courts and much greater resources with which to litigate land ownership claims.

As is so clearly apparent from the circumstances of the instant case, the Indian plaintiffs have been able to enlist the vast resources of the United States Department of Justice and the Bureau of Indian Affairs in litigating the title claim. The United States, in fact, is the original plaintiff and brought suit on behalf of the Tribe. 25 USC §194, by reversing the normal burden of proof in a case such as this has only served to give the United States and the Tribe a further and unconscionable advantage. Surely,

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16. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979).

in these circumstances, the statute serves no purpose in offsetting any "advantage" presumed to exist on the side of the non-Indian claimant.[17]

There is, we submit, no principled basis upon which an automatic assignment of the burden of proof to the "white person" or non-Indian can be constitutionally justified any longer.

CONCLUSION

For the reasons stated above we request that this Cross-Petition for a Writ of Certiorari be granted so that the Court can conduct a full review of the constitutionality of 25 USC §194.

Respectfully submitted,

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17. If the purpose of 25 USC §194 is to equalize the relative positions of the Indian and non-Indian claimant in litigation over property, this purpose is hardly served by exempting a state—whose "advantage" over the Indian would seem even more decisive—from coverage under that statute, as was done in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653.